IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-292

THOMAS L. FILE, ELIZABETH J. FILE, ROBERT H. FILE, FLORA V. FILE, BORIS CHERNIKOFF, JR., and HELEN E. CHERNIKOFF,

Petitioners,

v.

STATE OF ALASKA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alaska

RESPONDENT'S BRIEF IN OPPOSITION

AVRUM M. GROSS
ATTORNEY GENERAL

G. THOMAS KOESTER
ASSISTANT ATTORNEY GENERAL
Department of Law
Pouch K, State Capitol
Juneau, Alaska 99811

Counsel for Respondent

September 19, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-292

THOMAS L. FILE, ELIZABETH J. FILE, ROBERT H. FILE, FLORA V. FILE, BORIS CHERNIKOFF, JR., and HELEN L. CHERNIKOFF,

Petitioners,

v.

STATE OF ALASKA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alaska

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of Alaska respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Alaska Supreme Court's decision in this case. That decision is reported at 593 P.2d 268 (Alaska 1979).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Questions Presented involve only questions of evidence and factual findings.

The two Questions Presented in the petition (p. 2) are:

> "1. Whether the seaward boundary of a federal homestead patent issued in the State of Alaska along the coast of the Gastineau Channel under a 1924 survey is the meander line.
>
> "2. Whether the Alaska Supreme Court can construe a homestead patent to land conveyed by the Department of the Interior as not conveying the shoreline of the Gastineau Channel after inclusion of the shoreline has been affirmed by Shore Space Restoration Order No. 274 in 1935 prior to the issuance of the patent in 1937."

The first question is clearly a question of fact: was the seaward boundary of the federal homestead patent a meander line or a true line? The Alaska Supreme Court answered this question as follows:

> On its face, the 1932 survey seems clear, and indicates that line 5-6 (identical to line 14-1 of the 1924 survey) [the seaward boundary at issue] is a true line. By the time of the survey considerable accretion had already occurred in the area, and corner 6, (identical to corner 1 of the 1924 survey) was some distance in from the shoreline. The official plat of the 1932 survey does not show that the boundary of Pederson's property was the

> Gastineau Channel. Rather, line 5-6 angled sharply away from the water's edge. Corners 5 and 6 are not designated "meander corners." Moreover, the patent conveys to Pederson property amounting to 159.63 acres. This is the area of the property within the boundaries of the 1932 survey and does not include land visible on the plat extending beyond line 5-6.
>
> On the face of the patent therefore, there does not seem to be any question that the land conveyed to Pederson did not include the shoreline.

593 P.2d at 270-271 (see petition, p. 5b).

A cursory glance at the plats appended to the Alaska Supreme Court's opinion, 593 P.2d at 273 and 274 (see petition, pp. 9b and 10b), demonstrates that there is ample evidence in the record to support the Alaska Supreme Court's conclusion; a thorough reading of the opinion removes any conceivable doubt.

The rule in this situation was stated in *Portland Railway, Light, & Power Company v. Railroad Commission of Oregon*, 229 U.S. 397, 411-412 (1913) as follows:

> Ordinarily, in cases which come before us for review, this court accepts the facts as found by the state supreme court. An examination of the record in this case convinces us that the conclusions reached by the court do not bring the case within that exceptional class where this court will reexamine the facts found, with a view to ascertaining the correctness of the conclusions reached. In

> this case, the facts found by the lower court and adopted in the supreme court are supported by competent testimony; and this court does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the state having jurisdiction of the subject.

(Citations omitted.) Also see *Fry Roofing Company v. Wood*, 344 U.S. 157, 160 (1952).

The second question is an evidentiary one, going to the weight which the Court should place on a Shore Space Restoration Order. Again, the Alaska Supreme Court's conclusion should not be disturbed:

> Although this evidence is persuasive, we conclude as did the trial court, that without more, it is not sufficient to outweigh the evidence in favor of the state's position in the case.

593 P.2d at 272 (see petition, p. 7b). This Court should not retry the issue. *Portland R. Company v. Railroad Commission, supra; Fry Roofing Company v. Wood, supra.*

2. The issues were fully considered and correctly decided by the Alaska Supreme Court.

While the Questions Presented only involve factual determinations, Petitioners' argument intimates that the Alaska Supreme Court did not correctly decide the case. See petition, pp. 10-18. The Alaska Supreme Court stated its analytic approach as follows:

> Both parties agree that the issues in this case are controlled by federal law. When the

> federal government grants land via a patent, the patent is the highest evidence of title. Here, the patent incorporates by reference the plat of Survey No. 2136, made in 1932. The plat, including the surveyor's field notes and descriptions, thus becomes a part of the patent and controls the extent of the lands conveyed.

593 P.2d at 270 (see petition, p. 4b) (footnotes omitted).

Reference to the United States Supreme Court cases cited by the Alaska Supreme Court in support of this analytic approach demonstrates beyond question that the Alaska Supreme Court was aware of the procedure which must be followed in construing federal patents. The only remaining questions, as set out above, were factual ones which should not be reached by this Court.

3. Decisions which Petitioners contend are in conflict with the Alaska Supreme Court's decision in this case are distinquishable on their facts.

In *United States v. Lane*, 260 U.S. 662 (1923), and *Internal Improvement Fund of State of Florida v. Nowak*, 401 F.2d 708 (5th Cir. 1968), there was positive evidence that the surveyor intended the boundary to be shoreline. In the instant case, however, there was positive evidence that the surveyor left the shoreline and that the disputed boundary was intended by the surveyor to be a true line and not a meander line:

> ... [T]he surveyor clearly stated that from corner 14 he was continuing to corner 1 "on true line leaving meander line." ... [A]t

> each corner of the survey, the surveyor meticulously entered whether he was following a true line or a meander line. Line 13-14 was a meander line, clearly marked as such in the field notes. In contrast, the entry for line 14-1 can have only one meaning—that the surveyor was back on a true line. This inference is further bolstered by the insert to the plat of the 1924 survey which lists the course and distance of all meander lines in the survey. The line between corners 14 and 1 is not listed as being a meander line.

593 P.2d at 268 (see petition, p. 6b).

In *United States v. 295.90 acres of land*, 368 F.Supp. 1301 (D.C. Fla. 1974), the land was patented according to an unofficial survey and the surveyor had made the shoreline one of the calls of the description. In the instant case, the lands were patented according to an official survey where the disputed boundary was described in the field notes as a "true line."

The cases cited by Petitioners as conflicting with the Alaska Supreme Court's decision in this case are distinquishable on their facts. Since there is no conflict, the Alaska Supreme Court's decision should not be disturbed.

4. The issues are not important enough to warrant review by this Court.

The issues in this case are limited by the very detailed facts presented: a homestead patent incorporating by reference a plat showing the shoreline angling away from the homestead boundary, and a

Shore Space Restoration Order which (it is contended) casts doubt on the patent. It is probable that this limited, specific factual context will never arise again; if it does, the issues presented will be as narrow as the ones presented here and will be decided in the same way they were decided here. Review by this Court simply is unwarranted.

Summarizing, this was a simple factual case which was decided by the trial court and the Alaska Supreme Court in accord with prior decisions by this Court. It does not present any "special and important reasons" for granting a writ of certiorari as required by Rule 19 of the Rules of the Supreme Court, and otherwise presents no special or unique circumstances which justify granting the petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED this 19th day of September, 1979, at Juneau, Alaska.

Respectfully submitted,

AVRUM M. GROSS
ATTORNEY GENERAL

G. Thomas Koester
Assistant Attorney General